(2) Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAMON LOPEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CASE NO. 00-16074-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RAMON LOPEZ,
Appellant/Defendant.

vs.

UNITED STATES OF AMERICA,
Appellee/Plaintiff,

On Appeal From The United States District Court
For The Southern District of Florida,
Case No. 97-01422-CV-UUB/91-00317-CR-UUB

APPLICATION FOR CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Appellant, RAMON LOPEZ, hereby certifies pursuant to Eleventh Circuit Rule 26-1.1 that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Rhonda A. Anderson, Esq., Counsel-2255 proceedings

Hon. Ursula Ungaro-Benages, District Court Judge-2255 Proceedings

Joel Arthur Berger, Esq., Appellant Counsel-Crim. Case

Dawn Bowen, Esq., Asst. U.S. Attorney-crim. appeal

Stephen T. Brown, U.S. Magistrate Judge-crim. case

Edward B. Davis, U.S. Distr. Court Judge-temp. trial judge

Thomas Dawson, Esq., counsel-crim. case

Ramon Lopez, Appellant/Movant

A. Scott Miller, Esq., trial counsel

Susan Ponzoli, Esq., Assistant U.S. Attorney

Karen E. Rochlin, Esq., Prosecutor, Assistant U.S. Attorney

Norman C. Roettger, U.S. District Judge-orig. assigned trial judge

Robert A. Rosenblatt, Esq., Lopez' crim. trial counsel

Anne R. Schultz, Esq., Asst. U.S. Attorney/Chief-Appellate Div.

Madeline R. Shirley, Esq., Asst. U.S. Attorney-Crim. Appeal

Charlene H. Sorrentino, U.S. Magistrate Judge

_____

Rhonda A. Anderson, Esq.

APPLICATION FOR CERTIFICATE OF APPEALABILITY

THE APPELLANT, RAMON LOPEZ, by and through undersigned counsel, moves this Court to grant him an certificate of appealability of the following issues raised in the trial court below:

I. Whether the District Court erred in denying Ramon Lopez' motion for leave to file motion for reconsideration of Order Adopting Report and Recommendations of Magistrate Judge and request to supplement with issues based upon ***Apprendi v. New Jersey,***[1] where the Appellant received a life sentence and neither the Indictment, jury instructions, or the verdict presented the issue of the quantity of drugs for the jury's consideration?

II. Whether the District Court erred in denying Ramon Lopez' motions for discovery, to depose an essential witness, and requests to stay proceedings during pendency of Freedom of Information Act requests for evidence and information relevant to his motion for post conviction relief in the instant case?

III. Whether the District Court erred in adopting the findings of fact and conclusions of law of a magistrate judge in a related case where such rulings were based a Report and Recommendation that the district court had not yet affirmed?

IV. Whether The District Court Abused Its Discretion In Denying Ramon Lopez's Motion to Vacate, Reduce or Set Aside Sentence pursuant to 28 U.S.C. § 2255?

V. Whether The District Court Abused Its Discretion In Denying Ramon Lopez' Request For An Evidentiary Hearing Where the Facts Alleged, If Proved, Supported A Showing Of A Denial Of Lopez' Sixth Amendment Constitutional Right to Effective Assistance of Counsel?

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[1] 530 U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

STATEMENT OF FACTS

A. Course and Disposition of Proceedings:

On April 24, 1997, *Ramon Lopez* together with five co-defendants, were indicted for conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §846 in Count I, and possession with intent to distribute cocaine in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 in Count II. The Indictment did not specify that any specific quantity of cocaine, nor did the Government request jury instructions or verdict forms that required the jury to determine that element of the offenses charged. (91CR317-DE 1).

After a modified Allen charge was administered on the third day of deliberations, the jury convicted *Lopez* on both counts, but acquitted his codefendants, Nacy Garcia and Orosco-Zapata[2] (91CR317-DE 232,233,235).

During trial, over the Lopez' objection, the Government introduced evidence of *Lopez'* prior conviction (91CR317-R6-683-88; R7-712-27, 737,740,750,823; R10-1226). The trial court also denied *Lopez'* motion to strike the Government's evidence submitted pursuant to Fed. R. Evid. 404(b)(2) due to the Government failure to prove *Lopez'* involvement in the prior case. (91CR317-R10-1088-89). Thereafter, *Lopez* unsuccessfully sought admission of a certified copy of his notice of the prior conviction the Government had introduced. (91CR317-R10-1083-89).

The trial court sentenced *Lopez* to concurrent terms of life imprisonment, to be followed by five years supervised release. Further, pursuant to the Government's notice of intent to seek sentencing enhancement under 18 U.S.C. §3147, the trial court sentenced *Lopez* to a consecutive six month term of incarceration. (91CR317-DE-1,265). *Lopez* is presently incarcerated serving the sentence imposed in this cause.

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[2] Three of the originally charged codefendants, Gerardo Machado, Redelio Garcia and Luz Mary Del Pino, plead guilty. (91CR317-DE 192). However, at trial, two of the three who plead guilty testified for *Lopez* and one testified for the Government. (91CR317-R5-396, R10-1089-90,1173).

On April 29, 1997, *Lopez* filed a *pro se* motion to vacate, reduce or set aside his sentence pursuant to 28 U.S.C. § 2255 (hereinafter "2255 motion"), raising the following grounds:

(1) The trial court abused its discretion in admitting evidence of *Lopez'* prior conviction under appeal where, over the defendant's objection, the nature of the prior offense was published to the jury;

(2) *Lopez* was denied effective assistance of trial counsel;[3]

(3) The Government engaged in prosecutorial misconduct and violation of *Brady* by providing *Lopez* with erroneous *Jencks* materials, erroneously denying that the Government and informant targeted *Lopez*, and knowingly allowing the Government's key witness to lie at trial; and

(4) Evidence obtained in violation of the U.S. Constitution and U.S. Treaties was used to obtain *Lopez'* indictment and conviction. (DE-1).

Thereafter, on July 20, 1998, *Lopez* filed a motion for leave to invoke discovery and/or expand the record pursuant to Rules 6 and 7 of the Rules governing 2255 proceedings in order to obtain and introduce evidence of his first trial counsel's conflict of interest and ineffectiveness in failing to advise Lopez that the government provided him a written plea agreement after Lopez was debriefed. (91CR317-DE-345,346,350,351).

Without ruling on *Lopez'* motion for leave to invoke discovery and/or expand the record, on December 18, 1998, the Magistrate Judge entered a Report and Recommendation denying *Lopez'* 2255 Motion, (DE-3), and *Lopez* filed a motion for reconsideration of said Report and Recommendation. (91CR317-DE-356).

The District Court then entered an Omnibus Order granting, in part, *Lopez'* motion for reconsideration, but denying his motions for leave to invoke discovery and/or expand record, and to stay pending ruling on disclosure of discovery in related matter. (91CR317-DE-358). The order remanded *Lopez'* ineffective

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[3] Referred to in the Record as Claim V of Lopez' 2255 Motion.

assistance of counsel claim[4] back to the Magistrate Judge for further consideration. *Id.*

On June 22, 1999, the Magistrate Judge entered an order directing *Lopez* to provide a written Status Report. (91CR317-DE-359). *Lopez* then filed a Status Report together with a Supplement to his 2255 Motion, with supplemental objections to the first Report and Recommendation. (91CR317-DE-361-62, 365,369).

On June 21, 2000, the Magistrate Judge entered a Supplemental Report and Recommendation denying Claim V of Lopez' 2255 Motion without an evidentiary hearing, to which Lopez filed written objections. (91CR317-DE-380,384,387). The District Court then entered an Order summarily denying the written objections. (91CR317-DE-388). Thereafter, *Lopez* moved for leave[5] to file a motion for reconsideration and further supplement his 2255 Motion with an *Apprendi* claim. Those requests were likewise denied. (91CR317-DE-389-90). Thereafter, this appeal ensued, and the District Court denied Lopez' a Certificate of Appealability. (91CR317-DE-391).

B. <u>Facts Developed in Related 2255 Proceeding Regarding Ineffective Assistance of Counsel</u>:

Magistrate Judge Sorretino's Report and Recommendation in the instant case[6] heavily relied upon the factual findings of a Report and Recommendation of Magistrate Judge Garber[7] which has not been adopted and ratified by the District Court. (*See,*

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[4]Referred to in the Record as Claim V of Lopez' 2255 Motion.

[5]The Clerk had sent the Order to the undersigned's previous address. Therefore, the Order was not received within 10 days of its entry, and leave was accordingly sought.

[6] Southern District of Florida Case Nos. 97-1422-CV-UUB and 91-0317-CR-UUB.

[7]Southern District of Florida Case Nos. 97-1875-CV-EGD and 90-389-CR-EGD.

docket sheets and said Reports attached to instant Application as Ex. "A" through "F," respectively). Before the Sorrentino Report was entered, a separate evidentiary hearing was not conducted. Moreover, the District Court did not adopt or ratify the Garber Report at any time before or anytime thereafter. Further, the factual findings in the Garber Report have been strenuously objected to as either being totally unsupported in the record or clearly erroneous. (*See,* Ex. "A" through "D" to instant Application).

(1) Conflict of Interest - A. Scott Miller, Esq.

At the time that A. Scott Miller represented Lopez during the pre-trial stages of the instant case, Miller, a former Assistant U.S. Attorney, knew and had ample information to conclude that he was under investigation for criminal activities involving major drug traffickers. In addition, during Miller's representation of Lopez, he received a proposed written cooperation plea agreement from Assistant U.S. Attorney Karen Rochlin, but never advised Lopez verbally or in writing that any proposed written plea agreement was received.

Investigation, Prosecution, and Cooperation of Miller

From as early as October 1989 through November 1991, the Government commenced an investigation into Lopez' former counsel, Scott Miller. As part of the investigation, Assistant United States Attorney Paul Pelletier subpoenaed William Wood to testify before a grand jury on December 6, 1991. *See, grand jury transcript, Ex. "D"*[8] *to Lopez' Reply to Govt's Response to Supp. to 2255 Motion* (91CR317-DE-369). During his grand jury appearance, Mr. Wood acknowledged that he had been cooperating with the Government "for over 4 years." *Id,* at p. 5. Mr. Wood further explained that he had used Scott Miller, Esq. to complete transfers real estate purchased with drug funds to "innocent third parties," who were strawmen that Wood used. *Id.*

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[8]Although undersigned counsel did not oppose the Government's motion to seal said transcript, no Order appears in the record granting same. *See*, motion to strike and Lopez' Response at 91CR317-DE-371,372. The docket, however, incorrectly refers to Lopez' response as a "Response by USA." *Id.* at DE-372.

at pp. 10-13,15-19, 24-25, 27. Further, Mr. Wood began testifying for the Government as early as April 17, 1990 – wherein Scott Miller cross-examined Mr. Wood during the trial of Mauricio Ochoa. *Id. at Ex. "E" & Ex. "D," at p. 27.*

Additionally, then U.S. Customs Special Agent Ronald Ingelby commenced the investigation of Scott Miller as early as October, 1989 and ceased his participation in the investigation in November 1991 when he left Customs. *See, Id., at Ex. "C" - Affidavit of Chris Burns.*

Moreover, the type of interrogation the Government engaged in during their September, 1991 deposition of Scott Miller would have removed all doubt from the former prosecutor's mind that he was a target of a federal investigation. In that deposition, the Government specifically referred to the strawmen transactions that Miller committed on behalf of Mauricio Ochoa and William Wood. *See, Id. at Ex. "F."*[9] Further, around the time of the deposition, Agent Ingleby and Scott Miller had a brief conversation at the Metropolitan Correctional Center in Miami in which Miller intimated to Ingleby, "Ron, I have small children."[10] Thereafter, an Information charging Miller with making a false statement was filed. *See, Id. Ex. "F" and "G."* In a letter to his sentencing judge, Miller clearly acknowledged that during this deposition, he knew he was a target of a criminal investigation:

> Thus, there was no reason to avoid a truthful answer, [during the deposition] ***other than my own fear and panic over the very real threat to my career and freedom because I was a target of the government's investigation.*** . . .

Id., at Ex. "G" at p. 14. (emphasis added). Although Miller was given ample opportunity to present evidence at his sentencing

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[9] Deposition of Scott Miller taken Sept. 10, 1991, in *U.S. v. One Parcel of Real Estate at 106 Pt. Pleasant Dr., Key Largo, etc.*, So. Distr. Fla., Case No. 90-10058-Civ-King.

[10]This statement is contained in an Affidavit filed in the Garber case, Case No. 97CV1875/90CR389-DE-392-3.

hearing to show that a legitimate attorney-client relationship existed between him and Ochoa, Miller declined. *See, Id., at Ex. "H."*

Evidence of Miller's fear and panic of being a target is further bolstered by the accusatory nature of the Government's questioning during his deposition, and his reactions thereafter to Ingleby and the government. (*Id., Ex. "F").* -At the time the deposition was taken, Miller was actively representing Lopez. Further, at the time Miller's deposition was taken, all the potential claimants to the forfeiture proceeding had consented to forfeiture, except the straw man for Miller's former client, Ochoa. Approximately five weeks after Miller's deposition, the straw man, Jaime Moore, mailed a consent to default judgment to the Clerk from Colombia, S.A. *See, Id., Comp. Ex. "J," - copy of file from forfeiture case.*[11]

After Scott Miller exhausted all his appeals before this Court, Miller began cooperating with the United States Attorney's Office by testifying as a Government witness in the evidentiary hearings regarding Lopez' 2255 Motion pending before Magistrate Judge Garber.

(2) Plea Offer/Negotiations & Failure to Communicate to Lopez that that Government Faxed a Written Plea Agreement:

During his representation of the *Ramon Lopez,* Scott Miller received a Rule 11(e)(6) letter for the first debriefing of *Lopez* with the D.E.A. on June 18, 1991, and a fax of proposed Plea Agreement -- twenty-eight (28) days after the first debriefing.[12] *See,* Comp. Ex. "A" to Lopez' Supp. to 2255 Motion and Supplemental Objections to Report and Recommendation. (91CR317-DE-361-Ex. "A"). Nonetheless, during the earlier stages of the proceedings before Magistrate Judge Garber, District

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[11] In this file, Moore's Consent to Default is at DE-39.

[12]Ramon Lopez was debriefed a second time on or about July 28, 1991, by Agents of the United States Customs Service.

Judge Davis noted that Assistant U.S. Attorney Karen Rochlin boldly claimed that defense counsel could never prove that a plea offer ever existed.[13] However, the Movant fortuitously obtained a copy of a proposed plea agreement in a portion of the files of Scott Miller had on *Lopez.*

The first debriefing and the Plea Agreement were the result of Miller's efforts to resolve Lopez' cases through negotiation, which is memorialized in correspondence between counsel. See, *Letters between Assistant U.S. Attorney Karen Rochlin and Scott Miller, dated May 23, 1991, May 30, 1991, and June 18, 1991 [Rule 11 Proffer], and proposed Plea Agreement faxed to defense counsel on July 26, 1991.* (91CR317-DE-369-Ex. "K").

Scott Miller, however, never communicated the existence of the Plea Agreement to *Ramon Lopez,* (*See,* Movant's *Pro Se* 2255 Motion, 91CR317-DE-318), and such is ineffective assistance even where counsel has no conflict of interest.[14] *See,* Order Judge Davis entered on dated April 20, 1999, included in Comp. Ex. "A" to Supp. 2255 Motion. *Id.*

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[13] U.S. District Court Judge Davis noted in his April 20, 1999 Order:

> The Court notes that the transcripts reflect that the fact that at the March 12 hearing the Government, through "clever" testimony, suggested without lying that no plea offer was ever extended to Petitioner. *See, note 4,* of Exhibit A-1.

[14] ***Johnson v. Duckworth,*** 793 F.2d 898, 902 (7th Cir.), cert. denied, 479 U.S. (1986)(client must be involved in decision to accept or reject plea offer, and failure to inform client of offer constitutes ineffective assistance); ***United States v. Zelinsky,*** 689 F.2d 435 (3rd Cir. 1982)(same); ***Arredondo v. United States,*** - F.3d - , 1999 WL 335712, (6th Cir., May 28, 1999, Case Nos. 96-2126, 96-2583)(district court erred in failing to conduct evidentiary hearing based upon failure of lawyer to challenge quantity of drugs attributable to Movant and failure to communicate plea offer to Movant); ***Diaz v. United States,*** **930 F.2d 832, 834 (11th Cir. 1991)**(counsel has an obligation to consult with his client on important decisions and to keep him informed of important developments in the course of the prosecution); ***United States v. Blaylock,*** 20 F.3d 1458, 1466-67 (9th Cir. 1994)(where counsel failed to advise defendant of plea offer, district court erred in failing to conduct an evidentiary hearing). See also, ***United States v. Riascos,*** 164 F.3d 632 (9th Cir. 1998)(same).

Government's Negative Attitude Toward a Cooperation Plea Developed Later

The findings in the Magistrates' respective Reports that based upon that the Government was not interested in any cooperation from Lopez, are wholly without support in the record. The Magistrates' Reports based this lack of interest on a June 1992 letter from the Government. However, the Plea Agreement was negotiated and drafted during the summer of 1991; not 1992. More specifically, the relevant and critical periods in which Scott Miller represented Ramon Lopez and Mr. Lopez actively sought a plea agreement from ***May, 1991 through August, 1991.*** Thus, Magistrate Judges respective reliance on the Government's ***June 25, 1992 letter*** indicating that *one year later*, the Government was not interested in extending a cooperation plea to Mr. Lopez, is irrelevant. (Supp. Report at 2). Thus, the conflict and prejudice that flowed therefrom occurred when the Government extended a plea offer to Mr. Lopez in 1991; not 1992.

Further, the Record amply shows that in 1991, the Government debriefed Lopez, and *after* the debriefings, faxed the draft of a cooperation plea agreement to Scott Miller. The Government never accompanied the faxed agreement with any correspondence to indicate that the proposed Plea Agreement was not a plea offer, was merely a form faxed to Scott Miller to get him to stop calling the Assistant U.S. Attorney, Karen Rochlin, or that Scott Miller should advise *Mr. Lopez* that the Plea Agreement could not be construed as an actual offer, because the Government had developed a "negative attitude" toward Mr. Lopez. Moreover, Ms. Rochlin's testimony that during the debriefings that Ramon Lopez engaged in "emotional outbursts," is clearly and unequivocally contradicted by Scott Miller's testimony that *Ramon Lopez* did not engage in any such emotional outbursts. Rather, Miller described the atmosphere during the debriefings as ***"cordial."*** *See, Id.*, at Ex. "C," p. 17. Further, even assuming that any emotional breakdown occurred that would have rendered *Mr. Lopez* a witness who would not have withstood cross-examination, *Lopez'* cooperation was not tied to his testifying at trial for the Government. Rather, his cooperation only concerned

his providing "substantial assistance," -- which can take many forms.

Thus, the conclusion that the Government developed a *negative attitude toward* Ramon Lopez *during the debriefings, is not supported in the Record and further defies all common sense and reason.* See also, Id., *Ex. "B," pp. 5-6.*

District Court Erroneously Concluded Lopez Was Shown Written Plea Agreement

The District Court and Magistrate Judge erroneously concluded from commentary during the sentencing proceedings in the Garber/Davis case that "'there is no[t] question in this case that Mr. Lopez, myself [Miller], AUSA Rochlin, and the agents have **discussed plea negotiations.'"** *Supp. Report at 3. However, such references to "plea discussions" during a sentencing hearing in January of 1992, does not establish that Ramon Lopez was ever shown a copy of the final Plea Agreement the Government offered.*

Further, Scott Miller never testified that he recalls providing a copy of the faxed Plea Agreement to Ramon Lopez. *Rather, the lack of correspondence to support any communication that with the Government that* Ramon Lopez *refused to cooperate and rejected the final Plea Agreement, as was the customary practice for Scott Miller, the Government and the Agents involved -- clearly demonstrates that the Plea Agreement was never shown to* Mr. Lopez. *Specifically, Attorney Miller testified that it was his customary practice, after communicating a plea offer to a client, that if the client rejected the offer he would communicate the client's response back to the United States Attorney's Office or the case agent (June 10, 1999 transcript before Magistrate Garber, at pp. 29-31, attached as Ex. "C" to Appeal to Supp. Report and Recommendation). Similarly, the United States Custom Service possessed no records in their files that Scott Miller advised them that he had met with Ramon* Lopez *and* Lopez *decided not to accept the plea offer (*Id., *Ex. "C" at pp. 33-34). Likewise, Karen Rochlin testified that she had no knowledge as to whether Scott Miller ever showed the Plea Agreement to* Ramon Lopez. See, Id., *Jan. 10, transcript at p. 68).*

Thus, this District Court's reliance upon Scott Miller's "customary practice" of showing all plea agreements to his clients, is clearly erroneous. Further, when the lack of correspondence supporting a showing that the Plea Agreement was shown to *Ramon Lopez*, is coupled with the degree of stress that Scott Miller would have experienced during a criminal investigation of his involvement in money laundering with major traffickers, common sense and reason dictate that neither Miller nor any other human being would necessarily follow their "customary practices."

Lopez Has Adequately Demonstrated that He Would Have Accepted the Offer

Lastly, the District Court's conclusion that *Ramon Lopez* failed to present any evidence that he would have accepted the Government's final Plea Agreement is belied by the Record. During the sentencing hearing in the Garber/Davis case, *Ramon Lopez* clearly stated to the Court: *"I have tried every possible way to reach **an agreement**,* just like my attorney said, with the Government." (Transcript of sentencing at p. 15). That testimony remains unimpeached, and clearly indicates that *Ramon Lopez* never knew an Agreement existed. Further, that testimony shows that if *Ramon Lopez* knew he had an Agreement, he would have accepted it. He tried every possible way, -- but never knew that the Government had provided his counsel a written cooperation plea agreement. Thus, the District Court's conclusion that *Lopez* statement shows that he did not accept an agreement that he thought never existed, is clearly erroneous.

ARGUMENT

THE DISTRICT COURT IMPROVIDENTLY DENIED MOVANT'S CERTIFICATE OF APPEALABILITY WHERE MOVANT MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS RIGHT TO A FAIR TRIAL.

This Court has authority to issue a certificate of appealability where a district court has denied the defendant's application for

such, where a Movant makes a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2); ***Edwards v. United States,*** 114 F.3d 1083, 1084 (11th Cir. 1997). *See also,* Fed. R. App. P. 22(b).

To satisfy this requirement, the Movant "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are 'adequate to deserve encouragement to proceed further.' " ***Barefoot v. Estelle,*** 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394 n. 4, 77 L.Ed.2d 1090 (1983); *See also,* ***Livingston v. Johnson,*** 107 F.3d 297 (5th Cir. 1997).

As demonstrated in the Statement of Facts above, the record shows that *Ramon Lopez* made a substantial showing of the denial of substantial constitutional right: effective assistance of counsel, and denial of his right to a fair trial. Moreover, the record shows that *Lopez* was improvidently denied the opportunity to supplement his motion with materials sought through the Freedom of Information Act that the Government and the District Court refused to provide him leave to discover, and further denied the opportunity to supplement his 2255 Motion with a clearly warranted *Apprendi* claim. Additionally, the failure of the District Court to afford Lopez any discovery whatsoever in the 2255 proceedings, delay and hampered his ability to present additional evidence supporting his claims. Moreover, the District Court improperly relied upon factual findings of Magistrate Judge Garber which are clearly erroneous, wholly unsupported in the record, and not ratified or adopted by the District Court.

Lastly, the District Court's denial of the admission of Lopez' prior conviction in violation of the Supreme Court's subsequent decision in ***Old Chief v. United States,*** 117 S.Ct. 644 (1997).

Supplementation of 2255 Motion

Lopez sought to supplement his 2255 Motion with both additional facts and evidence to support his already existing claim of ineffective assistance of counsel, and submit a claim under the Supreme Court's decision in *Apprendi,* which was decided long after Lopez filed his *pro se* 2255 Motion. As explained in this Court's decision in ***Davenport v. United States,*** 217 F.3d 1341

(11th Cir. 2000), *pet. cert filed* Oct. 11,. 2000, No. 00-6561), Fed.R.Civ.P. 15 allows a party to amend or supplement a pleading. Further, Rule 15(c)(2) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Id.*

Further, the District Court's order failed to set forth reasons for the denying Lopez' request to supplement or his requests[15] to stay proceedings pending the conclusion of his multiple FOIA requests. ***United States v. Thomas,*** 221 F.3d 430 (3rd Cir. 2000)(district court abuses discretion when it denies leave to supplement without stating any justifying reason). Accordingly, the District Court's legal conclusion that it lacked authority to allow an amendment, is an issue of law and thus, is considered by this court de novo. *Id.*, at 1344, *See e.g.* ***Dang v. UNUM Life Ins. Co.,*** 175 F.3d 1186, 1189 (10th Cir.1999); ***Thomas,*** 221 F.3d, 433-34.

In ***Thomas,*** the Third Circuit considered the appeal of a defendant from the denial of his timely § 2255 motion in which he stated twenty-four grounds for relief. *See* 221 F.3d at 431-33. He subsequently filed a motion for permission to file a memorandum of law in support of his claims. The district court denied him permission to file the memorandum because it would be filed after the expiration of § 2255's one-year limitation period. It then denied his original motion because he failed to state a cause of action. On appeal, the Third Circuit held that, "under Fed.R.Civ.P. 15(c), a District Court may, in its discretion, permit an amendment which clarifies or amplifies a claim or theory in a timely filed § 2255 petition after the AEDPA's one-year period of limitations has expired." ***Thomas,*** 221 F.3d at 438. In remanding to allow the district court to reconsider the defendant's request to amend, the appellate court concluded that Rule 15(c) applies to

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[15]Said requests were done in his objections to the Supplemental Report and Recommendation.

allow amendment to § 2255 motions "as long as the petition itself was timely filed and the petitioner does not seek to add an entirely new claim or new theory of relief." *Id.* at 436; *see also* ***United States v. Duffus,*** 174 F.3d 333, 337 (3d Cir.) (stating in dictum that untimely amendment allowed "to clarify a claim initially made"), *cert. denied,* 528 U.S. 866, 120 S.Ct. 163, 145 L.Ed.2d 138 (1999).

Accordingly, the District Court abused its discretion in denying Lopez leave to supplement his already existing claims, and to supplement his *pro se* argument regarding the insufficiency of the Indictment set forth in his original 2255 Motion with the Supreme Court's ruling in ***Apprendi.*** Lopez received a life sentence, plus a consecutive six month term, and the Indictment did not charge him with any specific quantity of cocaine. Further, the neither the jury instructions nor the verdict required the jury to find that *Lopez* was responsible beyond a reasonable doubt for at least 5 kilograms of cocaine. Accordingly, the District Court erred in failing to allow *Lopez* to supplement his *pro se* 2255 Motion.

Denial of Discovery

In order to establish entitlement to discovery in a habeas proceeding, a movant must identify the essential elements of his claim, and that good cause exists for discovery to be granted. ***Bracy v. Gramley,*** - U.S. -, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). In determining whether the movant has made a showing of the essential elements of a claim, this Court may not weigh the evidence or deny discovery even if a theory alleged is speculative. ***See, Bracy,*** 117 S.Ct. at 1797 (difficulties of proof or speculative nature of theory is not sufficient to deny discovery, where such allegations, if proved, would show a violation of the Movant's right to a fair trial).

Lopez made specific requests for discovery that would show that Scott Miller was under investigation, knew that he was under investigation, failed to communicate to him that a written plea agreement had been sent, and that the Government was interested in his cooperation. Nevertheless, without stating reasons for such, the District Court summarily denied discovery even though the

matters requested went to the heart of Lopez' claims - denial of effective assistance of counsel. Accordingly, this denial demonstrates that it effected is ability to show denial of a constitutional right, and a certificate of appealability should issue.

Issues Concerning Effective Assistance of Counsel Claims

Additionally, the District Court's adoption of the Magistrate Judge Garber's findings of fact are clearly premature where they were subject to strenuous objections based upon lack of evidentiary support in the record. Moreover, the Order was additionally premature due to the pending FOIA requests for material evidence.

Assuming arguendo, that the District Court's Order was not premature, it clearly was based upon a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2); ***Edwards v. United States,*** 114 F.3d 1083, 1084 (11th Cir. 1997). Here, the claims were based on the failure of counsel with an actual conflict of interest, to communicate that a written plea agreement existed and was offered.

In ***Diaz v. United States,*** 930 F.2d 832 (11th Cir.1991), this Circuit recognized that where an attorney fails to consult with a client regarding a plea offer or other important decisions, such failure rises to the level of ineffective assistance of counsel. ***Diaz*** at 834-35. Specifically, the Court stated:

> Counsel has an obligation to consult with his client on important decisions and to keep him informed of important developments in the course of the prosecution. *Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); see also *Johnson v. Duckworth,* 793 F.2d 898, 902 (7th Cir.), cert. denied, 479 U.S. 937, 107 S.Ct. 416, 93 L.Ed.2d 367 (1986) (client must be involved in decision to accept or reject plea offer, and failure to inform client of offer constitutes ineffective assistance). To succeed on a claim of ineffective assistance of counsel, petitioner must show that his counsel's performance was so deficient as to deny him his

> guaranteed right to counsel and that the deficient performance prejudiced his defense. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068.
>
> Although counsel's advice to Diaz that the plea offer was "bullshit" does not alone suggest that Diaz was "involved" in the decision to reject the plea offer, it does indicate that counsel informed Diaz of the offer. Similarly, although Diaz denies that he and his counsel reached a decision to reject the offer, he obviously was aware of its rejection. The magistrate noted in his report, and the record supports the conclusion, that Diaz acknowledged that "counsel discussed the merits of the Government's offer with him and a decision was made to reject the offer. . . . "

Diaz, 930 F.3d at 834.

In the instant case, the Record shows that Scott Miller never communicated the Government's plea offer to Ramon Lopez, and that Lopez would have accepted a cooperation plea agreement. As he stated at his sentencing in the Garber/Davis case, "[i]n front of you, I say it again – I have the greatest disposition to cooperate with the Government." (Sentencing Transcript at p. 16). Thus, the result of the *Lopez'* sentencing would have been different, and at the very least, he would have received a reduction in his base offense level for acceptance of responsibility and a reduction for cooperation, which due to his attorneys' failure to communicate, was thwarted.

Therefore, the appropriate remedy in the instant case it to reinstate the original plea offer, thereby placing *Lopez* in the position he would have been in had the Sixth Amendment violation not occurred. In ***United States v. Blaylock,*** 10 F.3d 1458, 1468 (9th Cir. 1994), the Ninth Circuit observed:

> Since the remedy for counsel's ineffective

> assistance should put the Defendant b ack in the position he would have been if the sixth Amendment violation had not occurred, in certain circumstances, granting a new trial may not be the appropriate remedy. Several courts have recognized that where the ineffective assistance occurred before trial as in cases where the harm consisted in defense counsel's failure "to communicate a plea offer to the defendant . . . [granting a] subsequent fair trial does not remedy this deprivation . . . .

Blaylock, 20 F.3d at 1468. (citations omitted). *See also,* ***Mabry v. Johnson,*** 467 U.S. 504, n. 11 (1984) and ***United States v. Morrison,*** 449 U.S. 361,364 (1981).

As a result, Lopez clearly demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2); ***Edwards v. United States,*** 114 F.3d 1083, 1084 (11th Cir. 1997). *See also,* Fed. R. App. P. 22(b). *Lopez* satisfied this requirement by demonstrating "that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are 'adequate to deserve encouragement to proceed further.' " ***Barefoot v. Estelle,*** 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394 n. 4, 77 L.Ed.2d 1090 (1983); *See also,* ***Livingston v. Johnson,*** 107 F.3d 297 (5th Cir. 1997). Thus, a Certificate of Appealabilty should issue as to all of the requested issues regarding the ineffectiveness of counsel and the District Court's rulings thereon.

OldChief - Evidence of Prior Conviction

Additionally, in *Lopez'* original *pro se* 2255 Motion, he raised the District Court's failure to grant his objection to the admission of his prior conviction (which was on appeal), the substance of that conviction, and the denial of his request to submit a certified copy of the Notice of Appeal before the jury. In ***Old Chief v. United States,*** 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the Supreme Court held, *inter alia,* that the district court abused its discretion when it refused defendant's offer to admit to evidence of prior conviction element of offense and instead

admits full record of prior judgment of conviction when name or nature of prior offense raises risk of verdict. Additionally, the Court held that evidence of name and nature of defendant's conviction was not admissible to show prior felony conviction element of offense of possession.

Inasmuch as the jury acquitted *Lopez'* co-defendants who were allegedly involved in the conspiracy and offense charged, and on the third day of deliberations, the jury was given a modified Allen charge, the impact of the prior conviction caused *Lopez* significant prejudice. Further, evidence of a prior conviction is generally recognized to have the potential for prejudice even if a defendant's stipulation kpet the name and details of the previous offense from the jury. *See,* ***Spencer v. Texas,*** 385 U.S. 554, 560 (1967), ***United States v. Hardin,*** 139 F.3d 813, 185 (11th Cir. 1998).

Here, Lopez both objected to the admission of the evidence, and offered to ameliorate the prejudicial impact by admitting a certified copy of his notice of appeal. The District Court, however, refused both requests. Further the lengthy deliberations and acquittal of others alleged to be intimately involved clearly demonstrated that the admission of the additional evidence of a prior conviction prejudiced Lopez' constitutional right to a fair trial. Hence, Lopez demonstrated a substantial showing of the denial of his constitutional right to a fair trial, and a certificate of appealability should issue.

CONCLUSION

Based on the foregoing reasons and authorities, the Appellant, *Ramon Lopez,* respectfully requests that a certificate of appealability issue for the issues set forth herein.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed this 2ND day of March, 2001, to the ***Office of the United States Attorney, Appellate Division,*** Attn: Anne R. Schultz, Esq., 99 Northeast Fourth Street, Miami, Florida 33130.

_____

RHONDA A. ANDERSON, ESQ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 00-16074-F

RAMON LOPEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

August 17, 2001

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant failed to make a substantial showing of the denial of a constitutional right. See U.S.C. § 2253(c)(2).

J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 00-16074-F

District Court Case Nos. 97-01422-CV-UUB
and No. 91-00317-CR-UUB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RAMON LOPEZ,
Defenant/Appellant.

_____/

MOTION FOR RECONSIDERATION OF ORDER DENYING CERTIFICATE OF APPEALABHLITY

The Appellant, RAMON LOPEZ, by and through his undersigned counsel, respectfully moves this Court to reconsider its Order denying a Certificate of Appealability on the five (5) issues set forth in his Application. In support thereof, the Appellant would state:

A. *LENITY IS REQUIRED WHERE A SEVERE SENTENCE WAS IMPOSED UPON THE APPELLANT SEEKING A CERTIFICATE OF APPEALABILITY:*

This Court overlooked the lenity required where reviewing a habeas petitioner's request for a certificate of appealability (hereinafter "COA") where the petitioner is serving a severe penalty, such as the life sentence imposed against *Mr. Lopez* herein. (91Cr317-DE-1, 265). *See, **Moore v. Johnson,*** 215 F.3d 495 (5th Cir. 2000)(opined that uncertainty about the propriety of granting a COA would be resolved in habeas petitioner's favor, and the severity of his prescribed penalty of death would color the Court of Appeals' consideration of whether he had met his burden of making a substantial showing of denial of a constitutional right).

In the instant case, the Appellant raised five independent and separate basis for the granting of a COA, each of which presented issues debatable among jurists, and/or issues upon which a conflict exists among the various Circuit Courts. The crux of each of the issues presented in his COA is separately highlighted below:

B. *APPRENDI*[16] *APPLIES RETROACTIVELY:*

The Fifth Circuit recently reversed and remanded for further consideration as to the issue of retroactivity a request for COA on a Section 2255 motion in ***United States v. Clark,*** – F.3d –, 2001 WL 845193 (5th Cir., July 26, 2001). *See,* copy attached hereto at ***Appendix "A."*** Like the instant case, the appellant in ***Clark*** moved the trial court to amend his Section 2255 motion to raise *Apprendi* type issues. However, rather than denying Clark's certificate of appealability, two of the Fifth Circuit Judges ruled that the matter should be remanded for the district court to "reconsider it ruling denying Patrick Clark an amendment to his § 2255 motion based on futility in light of *Apprendi.*" *Id.,* Slip Opinion at p. 1.

In addition, Circuit Judge Parker in his thoroughly reasoned dissent, opined that the district court erred in ruling that Clark's motion to amend his initial § 2255 petition be denied based upon futility, and further opined that ***Apprendi*** announces a new substantive rule, and that ***Teague's***[17] prohibition against retroactivity does not apply. Hence, Judge Parker stated that the matter should not be remanded for further consideration, because the court could directly address the underlying claims without further delay.

In ***Clark,*** Judge Parker first examined the reasoning upon which the Fifth Circuit and/or the Supreme Court ruled that ***Richardson v. United States,*** 526 U.S. 813, 199 S.Ct. 1707, 143 L.Ed.2d 985 (1999) and ***Bailey v. United States,*** 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), applied retroactively.

With regard to ***Richardson,*** Judge Parker noted that in ***United States v. Lopez,*** 248 F.3d 427 (5th Cir. 2001), the Fifth Circuit held that ***Richardson*** was a "new rule," ***Lopez,*** 248 F.3d at 431, and that it was retroactively applicable on collateral review. *Id.* at 432. *See, **Clark,*** Slip Op. at 3. Similarly, the Fifth Circuit reasoned that the "decision in ***Bailey*** articulates the substantive elements that the government must prove to convict a person charged with using a firearm under § 924(c)(a). It explains what conduct is, and has always been, criminalized by the statute." ***United States v. McPhail,*** 112 F.3d 197, 199 (5th Cir. 1997).[18] Judge Parker noted that the Supreme Court subsequently adopted

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[1]530 U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[2]***Teague v. Lane,*** 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[3]Cited by Circuit Judge Parker in ***Clark*** at p. 4, Slip Opinion.

the same reasoning and conclusion in ***Bousley v. United States,*** 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) when it held that ***Bailey*** retroactively applied.

After noting that the Fifth Circuit (like the this Court)[19] has held that ***Apprendi*** defines the elements of drug offenses, Circuit Judge Parker examined the language of ***Apprendi*** and other courts that held that ***Apprendi*** is not retroactive, and opined that their logic was unpersuasive. He reached this conclusion based upon the prior precedent retroactively applying ***Richardson*** and ***Bailey***, and the risk that a person may be subjected to the maximum term of ten year to life imprisonment while being "actually innocent" of a sentencing enhancement. Circuit Judge Parker explained his reasoning as follows:

> ***Bousley 's*** holding turns on the idea of actual innocence and concerns itself with the "impermissibly large risk that the innocent will be convicted." *See* ***Bousley,*** 523 U.S. at 620, 118 S.Ct. 1604. An ***Apprendi*** claim in the context of § 841, in its simplest terms, asserts that while a defendant is guilty of possessing an unspecified quantity of a controlled substance, he is actually innocent of possessing the quantity necessary to be found guilty and sentenced under the more onerous provisions of 21 U.S.C. § 841(b). *See, e.g.,* § 841(b)(1)(A)(a maximum penalty of life imprisonment and a mandatory minimum of ten years' imprisonment); *see also* ***United States v. Pittman,*** 120 F.Supp.2d 1263, 1270 n. 9 (D.Or.2000)("[A] defendant may be 'actually innocent' of a sentencing enhancement while guilty of the underlying offense.").

Id., Slip Opinion at 6.

In the instant case, the Indictment contained no minimum quantity - as is necessary to trigger the enhanced sentencing provisions of § 841(b)(1)(A). Therefore, the enhanced sentence of life imprisonment that the District Court imposed on *Ramon Lopez* may be for a greater offense he is actually innocent of, while being guilty of the underlying offense – an offense for which the charging statute specifies a maximum of 20 years incarceration, while the Sentencing Guidelines themselves would specify a sentence pursuant to Guideline 12. Accordingly, Ramon Lopez' life sentence is illegal as well as unconstitutional. Therefore, *Mr. Lopez'* Petition for a COA presents a

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[4]***See United States v. Rogers,*** 228 F.3d 1318, 1320-21 (11th Cir.2000).

constitutional issue for which a COA should issue.

C. ***BASED UPON APPRENDI, THE TRIAL COURT LACKED JURISDICTION TO IMPOSE AN ENHANCED SENTENCE:***

Additionally, because neither the Indictment nor the instructions to the jury required the jury to find that *Ramon Lopez* was responsible for the quantity of drugs found at sentencing, a necessary element of Section 841(a) was not charged or proven. ***Jones v. United States,*** 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999),[20] and the failure to do so completely deprived the District Court herein of jurisdiction to impose any sentence. *See, e.g.,* ***United States v. Longoria,*** - F.3d -, 2001 WL 8815609 (5th Cir., July 19, 2001)(failure of indictment to charge a drug quantity and specific reference in the indictment to 21 U.S.C. 841(b)(1)(D) deprived the district court of jurisdiction to sentence defendant to more than 5 years incarceration). Furthermore, where an indictment does not allege a drug quantity, the evidence adduced at trial supporting the trial court's finding of drug quantity is not relevant. ***United States v. Gonzalez,*** - F.3d -, 2001 W.L. 815606 (5th Cir., July 19, 2001). *See,* ***Longoria*** and ***Gonzalez,*** attached hereto as ***Appendices "B"*** and ***"C,"*** respectively. Inasmuch as *Ramon Lopez* was not charged with any penalty provision in Section 841(b), the District Court below was likewise without jurisdiction to impose an enhanced penalty. Therefore, Petition for a COA presents a constitutional issue for which a

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[5]The federal carjacking statute examined in ***Jones,*** set forth a choice of three maximum penalties, two of which were dependent on proof of facts that did not need to be present in the indictment or decided by the jury. 526 U.S. at 229, 119 S.Ct. 1215. The basic statute provided a fine or imprisonment of not more than 15 years for the offense of carjacking, 18 U.S.C. § 2119(1), but if serious bodily injury resulted, the maximum time in prison was 25 years, § 2119(2), and if death resulted, the maximum was life imprisonment, § 2119(3).

Similarly, in the instant case, Title 21 U.S.C. § 841, requires a factual finding to determine if the violation of the applicable statute set forth in subsection (a) involved 5 kilograms or more of cocaine under subsection (b)(1)(A), or over 500 grams but less than 5 kilograms of cocaine under subsection (b)(1)(B).

Furthermore, like the indictment in Jones's case, which made no reference to the subsections of the statute, nor did it charge either that the defendant had inflicted serious bodily injury on the victim or death, the indictment herein wholly fails to identify the penalty provisions imposed after trial. *Lopez'* Indictment not only failed to identify which portion of charged offenses the government sought to impose, it failed to cite to the penalty provisions thereof altogether, and further failed to state any specific quantity of cocaine charged.

COA should issue.

D. *BASED UPON APPRENDI, 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B) ARE UNCONSTITUTIONAL:*

Moreover, both Sections 841(b)(1)(A) and (b)(1)(B) were recently held unconstitutional based upon their allowing the district court to sentence an individual based upon a "preponderance of the evidence," rather than by a "beyond a reasonable doubt" standard. *See,* ***United States v. Buckland,*** - F.3d -, 2001 WL 893440, Slip Op. at 6 (9th Cir., Aug. 9, 2001) - attached hereto as ***Appendix "D."*** Inasmuch as *Ramon Lopez* was sentenced pursuant to said sections, his sentence is unconstitutional, and a COA should be granted.

E. *CONCLUSION:*

Based upon the foregoing arguments and authority, this Court should grant the Appellant a COA or remand this matter to the District Court for further consideration in light of ***Clark, Longoria, Gonzalez*** and ***Buckland.***

Additionally, inasmuch as the "factual findings" of the District Court were based upon the factual findings of a Magistrate Judge in another matter – that were not final, and for which objections were filed, – the Court should grant the COA to enter an Order either;

(a) requiring the Magistrate Judge in this matter to conduct an evidentiary hearing, or,

(b) requiring the Magistrate Judge to reconsider her "factual findings" from a final order from the related case.

Further, based upon the District Court's failure to allow *Mr. Lopez* to conduct any discovery, or to stay the proceedings to allow *Mr. Lopez* an opportunity to present information properly requested pursuant to the Freedom of Information Act, this Court should remand this matter to permit *Mr. Lopez* to conduct the discovery requested, and direct the District Court to grant the stay requested.

Lastly, Mr. Lopez's petition for a COA presented a clear violation of his constitutional right to a fair trial pursuant to ***Old Chief v. United States,*** 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). Accordingly, a COA should additionally be granted as to this issue.

WHEREFORE, the Appellant, RAMON LOPEZ, through undersigned counsel, respectfully moves this Court to reconsider it denial of a Certificate of Appealability.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed (U.S. mail) this 27th day of August, 2001, to: ***Susan Ponzoli, Assistant United States Attorney,*** Appellate

Division, 99 Northeast Fourth Street, Miami, Florida 33132.

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By: _____
RHONDA A. ANDERSON, ESQ.
Florida Bar No.708038

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Undersigned counsel certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Rhonda A. Anderson, Esq.
Hon. Ursula Ungaro-Benages, District Judge
Ramon Lopez
Susan Ponzoli, Assistant United States Attorney
Karen E. Rochlin, Assistant United States Attorney
Anne R. Schultz, Assistant United States Attorney

By:_____
RHONDA A. ANDERSON, ESQ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 00-16074-F

RAMON LOPEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

October 25, 2001

Before: EDMONDSON and WILSON, Circuit Judges.

BY THE COURT:

Upon reconsideration of this Court's order dated August 17, 2001, appellant's motion for a certificate of appealability is DENIED because appellant failed to make the requisite showing. See U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).